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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BIOSUCCESS BIOTECH CO.,
LTD.,

Plaintiff,

v.

RICH PHARMACEUTICALS,
INC.; IMAGIC, LLC, RICHARD
CHANG HOLDINGS, LLC; BEN
CHANG; and DOES 1 through 10,

Defendants.

Case No.: 2:14-CV-00310-JAK (ANx)

OPPOSITION OF PLAINTIFF
BIOSUCCESS CO., LTD. TO
DEFENDANTS' MOTION TO
DISMISS COMPLAINT

Judge: Hon. John Kronstadt
Place: Courtroom 750, 7th Floor
Date: May 12, 2014
Time: 8:30 a.m.

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiff Biosuccess Biotech Co., Ltd. (“Biosuccess”) is a pharmaceutical research and development company that is working on a promising method for treating serious conditions such as leukemia, HIV/AIDS, and stroke. Biosuccess has spent nearly a decade conducting medical research and development, painstakingly gathering data and other confidential information as the result of investing—and risking—valuable time and resources.

Defendant Ben Chang and his father have taken Biosuccess’s valuable intellectual property and given it to their competing entity, defendant Rich Pharmaceuticals. Biosuccess filed this action to hold Defendants accountable for their unlawful actions that threaten to destroy not only Biosuccess’s business, but the medical progress it has made over the years. Defendants move to dismiss in part based on the bold premise that this suit is “premature” because they do not yet have FDA-approved products available on the market.

Unsurprisingly, the law is to the contrary. All of Biosuccess’s claims are ripe—Defendants have breached duties to Biosuccess, infringed and misappropriated its hard-won intellectual property, and destroyed its valuable data. As detailed below, each of Biosuccess’s claims for relief is adequately pled and Defendants’ Motion to Dismiss (Dkt. No. 30, “Motion”) should be denied in its entirety.

LEGAL STANDARDS

A pleading should set forth a “short and plain statement” of the claim asserted. Fed. R. Civ. P. 8; *see also O2 Micro Int’l Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1366 (Fed. Cir. 2006) (stating that the Federal Rules replaced a system in which the issues had to be conclusively defined at

1 the outset of litigation through the pleadings with a system that relied on
2 discovery and pretrial hearings to gradually identify the precise issues in
3 dispute as more information became available); *McZeal v. Sprint Nextel*
4 *Corp.*, 501 F.3d 1354, 1357 n.4 (Fed. Cir. 2007) (holding that the Supreme
5 Court’s decision in *Twombly* did not change the pleading requirements of
6 Federal Rule of Civil Procedure 8 in actions for patent infringement).

7 Since the crux of Rule 8 is to provide a party fair notice of the claim
8 against which it must defend, excessive detail is not required to properly state
9 a claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Rather, a claim is
10 well-pled so long as the complainant has provided the defendant “*fair notice*
11 of what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp.*
12 *v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations omitted)
13 (emphasis added); *see also Erickson v. Pardus*, 551 U.S. 89, 93 (2007)
14 (“[s]pecific facts are not necessary”); *Iqbal*, 556 U.S. at 680 (stating that
15 factual allegations need only move a claim “across the line from conceivable
16 to plausible.”). “Rule 12(b)(6) motions are viewed with disfavor.” *Broam v.*
17 *Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003) (citing *Gilligan v. Jamco Dev.*
18 *Corp.*, 108 F.3d 246, 248-49 (9th Cir. 1997)).

19 “Dismissal without leave to amend is proper only in ‘extraordinary’
20 cases.” *Id.* at 1028 (internal citation omitted). On a motion to dismiss, the
21 court should accept as true all facts alleged in the complaint, and draw all
22 reasonable inferences in favor of the plaintiff. *Newcal Indus., Inc. v. Ikon*
23 *Office Solution*, 513 F.3d 1038, 1043 n.2 (9th Cir. 2008).

24 Further, in reviewing the sufficiency of a complaint, “[t]he issue is not
25 whether a plaintiff will ultimately prevail but whether the claimant is entitled
26 to offer evidence to support the claims.” *Gilligan*, 108 F.3d at 249. Thus, the
27 Court’s task is merely to assess the legal feasibility of the complaint, not to
28 assess the weight of the evidence which might be offered in support thereof.

1 *Roberts v. N. Am. Van Lines*, 394 F. Supp. 2d 1174, 1178 (N.D. Cal. 2004).

2 **ARGUMENT**

3 **I. Defendants' Motion Should Be Denied for Failure to** 4 **Meet and Confer as Required By Local Rule 7-3.**

5 Defendants' Motion is procedurally defective and should be denied
6 outright for failure to comply with both the letter and spirit of Civil Local
7 Rule 7-3, which requires that a movant meet and confer in good faith with
8 opposing counsel at least seven (7) days prior to filing its motion. Rule 7-3
9 obligated Defendants to make a reasonable effort to contact opposing counsel,
10 which they failed to do. This is readily corroborated by their omission of the
11 required language set forth in the Local Rule regarding conferences of
12 counsel: "This motion is made following the conference of counsel pursuant
13 to L.R. 7-3 which took place on (date)." Civ. L.R. 7-3.

14 Instead, Defendants claim that they "attempted to meet and confer with
15 counsel for Plaintiff" and "offered to stipulate to the filing of an amended
16 complaint within the next 20 days." Liang Declaration ISO Opposition
17 ("Liang Decl."), ¶ 2 & Exh. A. What Defendants neglect to mention is that
18 their "attempt" to meet and confer occurred *fewer than seven hours before*
19 they filed this Motion. Liang Decl., ¶ 2 & Exhs. A & B. This conduct is
20 particularly egregious in light of the fact that Biosuccess had previously
21 granted Defendants *two* extensions to respond to the Complaint and even
22 agreed to withdraw its Motion for Default Judgment against Defendant Rich
23 Pharmaceuticals. Liang Decl., ¶¶ 3-4 & Exhs. C & D. Defendants should not
24 have waited until the last minute to request a meet and confer and can
25 provide no excuse for their delay.

26 Moreover, this is now *at least the third time* that counsel for
27 Defendants, Jack Russo, has failed to follow Local Rules. Mr. Russo
28 represents Plaintiff Richard Chang in related Case No. 2:13-cv-1340-JAK,

brought by Richard Chang against Biosuccess (the “R. Chang Case”). In that case, (1) Mr. Russo violated Local Rules 7 and 37 by filing a defective “motion to compel” that lacked the meet/confer certification and was not even in the form of a joint stipulation; after Biosuccess counsel pointed this out and threatened sanctions, Mr. Russo withdrew the motion (*see* Liang Decl. ¶ 5 & Exh. E); (2) next, Mr. Russo violated Local Rules 7 and 56 by filing a defective summary judgment motion that lacked the meet/confer certification and failed to submit the required “Statement of Uncontroverted Facts and Conclusions of Law”; counsel for Biosuccess pointed this out to Mr. Russo, but Mr. Russo proceeded to file this procedurally defective Motion anyway (*see* Liang Decl., ¶ 6 & Exh. F).

Defendants’ Motion should therefore be denied as procedurally defective for failing to comply with Civil L.R. 7-3. *See Singer v. Live Nation Worldwide, Inc.*, 2012 WL 123146, *1-2 (C.D. Cal. Jan. 13, 2012) (denying motion for violation of Civ. L.R. 7-3 where party sent letter a “mere three days” before motion was filed; holding that “conversations about the merits of [] claims” “do not equate with discussions regarding a contemplated motion”); *Valdovinos v. County of Los Angeles*, 2008 WL 2872648, *1-2 (C.D. Cal. July 23, 2008) (denying motions for failure to comply with Civ. L.R. 7-3).

II. Plaintiff Has Sufficiently Pled a Claim for Patent Infringement.

Defendants do not appear to challenge Biosuccess’s claim for direct patent infringement. A claim for patent infringement requires “(1) an allegation of jurisdiction; (2) a statement that the plaintiff owns the patent; (3) a statement that defendant has been infringing the patent ‘by making, selling, and using [the composition or product] embodying the patent’; (4) a statement that the plaintiff has given the defendant notice of its infringement;

1 and (5) a demand for an injunction and damages.” *In re Bill of Lading*, 681
2 F.3d 1323 (Fed. Cir. 2012) (holding that allegations that meet the
3 requirements of model “Complaint for Patent Infringement” Form 18
4 satisfied pleading requirements). Biosuccess has indeed met the requirements
5 required for direct patent infringement. Complaint, ¶ 10 (jurisdiction); ¶¶ 33,
6 44 (ownership in the patent), ¶ 45 (infringement); ¶ 47 (notice of
7 infringement); ¶¶ 51-51 (demand). Indeed, Biosuccess’s patent complaint
8 tracks the Model. [*Compare* Biosuccess Complaint with Civil Form 18,
9 attached as Exh. G to Liang Decl.].

10 Instead, Defendants take issue with Biosuccess’s allegations of
11 contributory and infringement of the ‘814 Patent, citing paragraphs 48-49 of
12 the Complaint. *See* Mtn. at 4:3-11. However, Biosuccess has adequately pled
13 both induced infringement and contributory infringement at this stage. The
14 Federal Circuit has held that, to survive a motion to dismiss indirect
15 infringement claims, “complaints must contain facts plausibly showing”
16 indirect infringement, but “[t]his does not mean, however, that [plaintiff]
17 must prove its case at the pleading stage.” *In re Bill of Lading*, 681 F.3d at
18 1339. This plausibility requirement “is not akin to a ‘probability requirement
19 at the pleading stage; it simply calls for enough fact [s] to raise a reasonable
20 expectation that discovery will reveal’ that the defendant is liable for the
21 misconduct alleged.” *Id.* (quoting *Twombly*, 550 U.S. at 556). Biosuccess has
22 made such a showing, by alleging that Defendants have induced and
23 contributed to the infringement of the ‘814 Patent by making, using, selling,
24 offering to sell, and/or importing products to others through their website and
25 businesses. *See* Complaint, ¶¶ 25-37, 48-49.

1 **III. Plaintiff Has Sufficiently Pled a Claim for Copyright**
 2 **Infringement.**

3 **A. A registered copyright is not required to state a claim for**
 4 **copyright infringement.**

5 Citing 17 U.S.C. § 411(a), Defendants argue that “a valid copyright
 6 registration is an [sic] requirement for the Court to hear any claim for
 7 copyright infringement under the Copyright Act.” Mtn. at 4:23-25.
 8 Defendants are wrong. The Ninth Circuit has held that the filing of a
 9 copyright application is sufficient. *Cosmetic Ideas, Inc. v. IAC/*
 10 *InterActiveCorp.*, 606 F.3d 612, 621-22 (9th Cir. 2010) (“We therefore hold
 11 that receipt by the Copyright Office of a complete application satisfies the
 12 registration requirement of § 411(a).”) As the Court explained, “[t]his
 13 interpretation ensures the broad copyright protection that the 1976 Act
 14 provided.” *Id.* Additionally, it “also fully accomplishes the central purpose
 15 of registration—the compilation of a robust national register of existing
 16 copyrights—and at the same time avoids unfairness and waste of judicial
 17 resources.” *Id.* (internal citations omitted).

18 Biosuccess has filed a copyright application covering the material
 19 asserted—namely, its website. Complaint, ¶ 28; *see* Liang Decl., Exh. H.
 20 Moreover, this application was filed on October 29, 2013, over two months
 21 before Biosuccess instituted this action. Therefore, § 411(a) does not bar
 22 Biosuccess’s copyright infringement claim, which should proceed on the
 23 merits. *Cosmetic Ideas*, 606 F.3d at 622.

24 **B. The Complaint adequately alleges virtually identical copying**
 25 **by Defendants.**

26 To state a claim for copyright infringement, Biosuccess must allege: (1)
 27 which original works are the subject of the copyright claim; (2) that it owns
 28 the copyrights in those works; (3) that the copyrights have been registered in

1 accordance with the statute, and (4) by what acts during what time the
 2 defendants infringed. *E.W. Sounds, Inc. v. Phoenix*, 2012 WL 4003047, *4
 3 (C.D. Cal., Sept. 10, 2012). To prove infringement, a plaintiff must show (1)
 4 ownership of a valid copyright, and (2) that defendants copied constituent
 5 elements of the protected work that are original. *Three Boys Music Corp. v.*
 6 *Bolton*, 212 F.3d 477, 481 (9th Cir. 2000).

7 Because direct evidence of copying is rarely available and copying can
 8 therefore be difficult to prove, a plaintiff “may establish copying by showing
 9 (1) circumstantial evidence of access to the protected work, and (2)
 10 substantial similarity of ‘ideas’ and ‘expression’ between the copyrighted
 11 work and the allegedly infringing work.” *Jason v. Fonda*, 526 F. Supp. 774,
 12 776 (C.D. Cal. 1981), *aff’d*, 698 F.2d 966 (9th Cir. 1982); *see also Three*
 13 *Boys Music*, 212 F.3d at 481. Biosuccess has sufficiently alleged all these
 14 elements. *See* Complaint, ¶¶ 38-41 (copyrighted subject matter is the
 15 website), ¶ 38 (ownership); ¶ 13 (website is copyrighted); ¶¶ 39-40,
 16 53(defendants’ actions).

17 Defendants argue that Biosuccess’s copyrighted materials are “thin”
 18 because they are factual and scientific in nature. Therefore, Defendants argue,
 19 to prove infringement, Biosuccess must show that the alleged copying was
 20 “virtually identical.” Mtn. at 5:4-18. However, a work is copyrightable even
 21 if it is compiled entirely of uncopyrightable elements. *See, e.g. Feist Publ’n,*
 22 *Inc., v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991); *Metcalfe v. Bochco*,
 23 294 F.3d 1069, 1074 (9th Cir. 2002) (holding that particular sequence of
 24 events in which an author strings a significant number of unprotectable
 25 elements can itself be a protected element). Moreover, it is clear from the
 26 facts alleged in the Complaint that Defendants’ copying of Biosuccess’s
 27 website *was* virtually identical. *See* Complaint, ¶ 41. In many instances, the
 28 copying was *verbatim*. *Id.* Defendants have created a virtually identical

1 compilation of graphics, texts, etc. for their website as that of Plaintiff's site,
 2 and have done so not only by "copying" the website, but by taking the actual
 3 data from Plaintiff and using it as their own.

4 In any event, the Court has no obligation to rule on the merits of
 5 Biosuccess's copyright claim at this initial stage of the litigation. Substantial
 6 similarity is a question of fact that courts should be hesitant to decide at even
 7 the summary judgment stage and, therefore, should not be resolved on a
 8 motion to dismiss. *See, e.g. Frybarger v. Int'l Bus. Machs. Corp.*, 812 F.2d
 9 525, 528 (9th Cir. 1987) (stating that summary judgment is not highly
 10 favored on the issue of substantial similarity); *Shaw v. Lindheim*, 919 F.2d
 11 1353, 1355 (9th Cir. 1990) ("Where reasonable minds could differ on a
 12 finding of substantial similarity, summary judgment is improper."). Thus, the
 13 Court should not engage in an analysis of the similarity of the parties' works
 14 at this stage.

15 **IV. Plaintiff Has Sufficiently Pled a Claim for Trade Secret** 16 **Misappropriation.**

17 In order to state a claim for trade secret misappropriation, Biosuccess
 18 must allege: (1) the existence of a trade secret and (2) misappropriation of a
 19 trade secret. Cal. Civ. Code § 3426.1(b). Biosuccess has more than met these
 20 requirements. Defendants' reliance on case law requiring that the subject of
 21 the trade secret be described with "sufficient particularity" is misplaced, as
 22 that case concerned the sufficiency of identification of trade secrets on
 23 summary judgment, *not* a motion to dismiss. Mtn. at 6:26-7:6 (citing *Mattel,*
 24 *Inc. v. MGA Entm't Inc.*, 782 F. Supp. 2d 911, 989 (C.D. Cal. 2011)).

25 Biosuccess has identified its trade secrets. It alleges that Ben Chang
 26 had access to "all of Biosuccess's most sensitive trade secrets, *including*
 27 *years of research data related to PD-616 and its proprietary formulations.*"
 28 Complaint, ¶ 20 (emphasis added); *see also* Complaint, ¶ 63. Moreover,

1 Biosuccess has adequately stated that Defendants misappropriated these trade
 2 secrets. *See* Complaint, ¶ 23 (taking of trade secrets); ¶¶ 25-37 (disclosure of
 3 trade secrets). The Court should not dismiss this claim.

4 **V. Plaintiff's Common Law Claims Are Not Preempted.**

5 **A. Plaintiff's common law claims are not based on upon**
 6 **misappropriation of a trade secret.**

7 Defendants argue that the following causes of action are preempted by
 8 that California Uniform Trade Secrets Act (CUTSA): Fourth (breach of
 9 fiduciary duty), Fifth (unfair competition under Bus. & Prof. Code § 17200),
 10 Sixth (common law unfair competition), Ninth (inducing breach of contract),
 11 Tenth (inducing breach of fiduciary duty), Eleventh (conversion), Twelfth
 12 (conspiracy), and Thirteenth (aiding and abetting). Defendants are wrong.

13 Defendants rely on *K.C. Multimedia Inc. v. Bank of Am. Tech. &*
 14 *Operations, Inc.*, 171 Cal App. 4th 939, 954 (2009) for this proposition. But
 15 as that case makes clear, the CUTSA does not preempt “other civil remedies
 16 *that are not based upon misappropriation of a trade secret.*” *Id.* at 954
 17 (quoting § 3426.7) (emphasis added). It is important to note that Biosuccess
 18 alleges not only misappropriation of trade secrets, but also other confidential
 19 information. *See e.g.*, Complaint, ¶ 25 (payroll information). This is a much
 20 broader definition than that of a trade secret in CUTSA. *See* Cal. Civ. Code
 21 § 3426.1(d). Therefore, Biosuccess's common law claims should not be
 22 dismissed. *See First Advantage Background Servs. Corp. v. Private Eyes,*
 23 *Inc.*, 569 F. Supp. 2d 929, 942 (N.D. Cal. 2008) (CUTSA does not preempt
 24 where the “confidential information at the foundation of the claim is not a
 25 trade secret, as that term is defined in CUTSA” because “[b]y its own
 26 terms, . . . CUTSA only provides remedies for misappropriation of *trade*
 27 *secrets*, not of any confidential information, and defines that term specifically.
 28 *See* Cal. Civ. Code §§ 3426.1(b), (d), 3426.2, 3426.3.”); *c.f. SunPower Corp.*

1 v. *SolarCity Corp.*, 2010 WL 6160472 (N.D. Cal. Dec. 11, 2012) (noting
2 disagreement among courts).

3 Regardless, although the misappropriation of trade secrets and
4 confidential information form part of the facts here, Defendants have
5 engaged in several separate and independent wrongful acts. None of the eight
6 claims at issue here are based on the same facts or theories of recovery as
7 misappropriation:

8 ***Claim 4—Breach of Fiduciary Duty:*** The Complaint alleges that Ben
9 Chang breached his fiduciary duties of loyalty and confidentiality as an
10 officer of Biosuccess by undertaking a number of bad acts, including:
11 deleting emails and computer files (§ 22); spreading untrue and misleading
12 statements to employees of Biosuccess’s U.S. subsidiary (§ 25); attempting
13 to induce Dr. Han to leave Biosuccess (§ 25); and setting up a competing
14 business by exploiting Biosuccess’s intellectual property (§ 37). This claim
15 is clearly not based upon misappropriation of a trade secret.

16 ***Claims 5 and 6—Unfair Competition:*** The Complaint alleges that all
17 Defendants engaged in unlawful, unethical, or immoral acts, including:
18 spreading untrue and misleading statements to employees of Biosuccess’s
19 U.S. subsidiary (§ 25); attempting to induce Dr. Han to leave Biosuccess
20 (§ 25); and setting up a competing business by exploiting Biosuccess’s
21 intellectual property (§ 37). This claim is also clearly not based upon
22 misappropriation of a trade secret.

23 ***Claims 9 and 10—Inducing Breach of Contract and Inducing***
24 ***Breach of Fiduciary Duty:*** The Complaint alleges that Defendants Rich
25 Pharmaceuticals, Imagic and RLC Holdings all induced Ben Chang and third
26 parties Dr. Han and Richard Chang to breach their non-disclosure agreements
27 and fiduciary duties of loyalty and confidentiality as an officer of Biosuccess,
28 including by: attempting to induce Dr. Han to leave Biosuccess (§ 25); and

1 offering them executive positions in exchange for their agreement to work
 2 with the entity defendants to exploit Biosuccess's intellectual property (§§ 28,
 3 35, 37). This claim is clearly not based upon misappropriation of a trade
 4 secret.

5 ***Claim 11—Conversion:*** The Complaint alleges that Ben Chang
 6 accessed and deleted information on Biosuccess's computers without
 7 authorization (§ 22), which itself is a wrongful act independent of trade secret
 8 misappropriation. *Thrifty-Tel, Inc. v. Bezenek*, 46 Cal. App. 4th 1559, 1566
 9 n.7 (1996) (characterizing unauthorized access of a computer as being "in the
 10 nature of a trespass").

11 ***Claims 12 and 13—Conspiracy and Aiding and Abetting:*** Defendants
 12 are liable for civil conspiracy and aiding and abetting because they agreed to
 13 a common plan or design to commit a tortious act and thereby harmed
 14 Biosuccess. Complaint, § 25. Because none of the predicate torts that
 15 defendants conspired to commit—discussed above—depend on trade secret,
 16 these counts also are not preempted.

17 The facts critical to Biosuccess's common law claims are not the same
 18 as the facts necessary to prove its trade secret misappropriation claim. Should
 19 the Court decide otherwise, Biosuccess respectfully requests leave to amend
 20 to separately set forth additional allegations supporting these claims.

21 **B. It is premature for the Court to dismiss these claims on the**
 22 **basis of preemption.**

23 Some courts have held that it is premature to dismiss claims before
 24 first resolving the factual question of whether the information at issue
 25 qualifies as a trade secret under CUTSA. *See, e.g., Amron Int'l Diving Supply,*
 26 *Inc. v. Hyrdolinx Diving Commc'n, Inc.*, 2011 WL 5025178, *9-10 (S.D. Cal.
 27 Oct. 21, 2011) ("Defendants' motion to dismiss based on preemption cannot
 28 be addressed until it is determined whether the allegedly misappropriated

1 information constitutes a trade secret. At this point in the case, the status of
 2 the information is merely a matter of allegation and until the distinction is
 3 made between [plaintiff's] allegedly misappropriated trade secret information
 4 and its confidential or non-confidential proprietary non-trade secret
 5 information, the question of preemption should not be addressed.”); *Think*
 6 *Village-Kiwi, LLC v. Adobe Sys., Inc.*, 2009 WL 902337, *3 (N.D. Cal. Apr.
 7 1, 2009) (granting motion for leave to file amended complaint, holding that
 8 “[t]he Court finds no authority holding that CUTSA preempts common law
 9 claims even if the confidential information is a protectible [sic] interest other
 10 than a trade secret”); *Phoenix Techs. Ltd. v. DeviceVM*, 2009 WL 4723400,
 11 *5 (N.D. Cal. Dec. 8, 2009) (ruling on motion to dismiss, distinguishing *K.C.*
 12 *Multimedia*, and finding that because common law claims “are based on
 13 Defendants’ diversion and/or wrongful use of Plaintiff’s ‘Proprietary
 14 Information,’ as defined in the Agreement, these claims are not limited to
 15 trade secrets and, thus, are not preempted”).

16 **C. Biosuccess may plead inconsistent claims.**

17 Although Biosuccess’s common law claims do not rely upon the same
 18 facts as its trade secret claim as discussed above, the Federal Rules of Civil
 19 Procedure also permit a party to plead alternative theories of relief and
 20 inconsistent claims. Fed. R. Civ. P. 8(d)(3). Courts have agreed, refusing to
 21 dismiss inconsistent theories of liability. *MB Financial Group, Inc. v. United*
 22 *States Postal Service*, 545 F.3d 814, 819 (9th Cir. 2008) (noting that both
 23 contract and tort claims could go forward since “a plaintiff is generally
 24 entitled to plead alternative or multiple theories of recovery on the basis of
 25 the same conduct on the part of the defendant.”).

26 Therefore, to the extent the Court finds that any of Biosuccess’s
 27 common law claims are preempted by its claim for trade secret
 28 misappropriation under the CUTSA, the common law claims should stand as

1 alternative theories of relief to Biosuccess's trade secret claim and therefore,
 2 are not preempted. *See e.g., In Terarecon, Inc. v. Fovia, Inc.*, 2006 WL
 3 1867734, *10 (N.D. Cal. July 6, 2006) (finding conversion claim was
 4 alternative theory to CUTSA claim). Biosuccess should therefore be
 5 permitted to pursue alternative theories of liability pursuant to Rule 8(d).

6 **D. Defendants' preemption argument contradicts their argument**
 7 **that the trade secret claim is insufficient.**

8 Defendants' argument that Biosuccess's common law claims are preempted
 9 by its trade secret claim directly contradicts their argument that Biosuccess
 10 has not sufficiently stated a claim for trade secret misappropriation under the
 11 CUTSA. Under similar circumstances, one court has refused to find
 12 preemption at the pleading stage, holding that the defendants' argument that
 13 trade secret allegations are preempted by CUTSA contradicted their primary
 14 defense that the plaintiff's information did not constitute trade secrets. *Think*
 15 *Village-Kiwi*, 2009 WL 902337, *2 (N.D. Cal. Apr. 1, 2009) (citing *Callaway*
 16 *Golf Co. v. Dunlop Slazenger Group Americas, Inc.*, 295 F.Supp.2d 430, 437
 17 (D. Del. 2003)). As the court there concluded, "Defendants cannot have it
 18 both ways." *Id.*

19 **VI. Plaintiff's "Deletion" Claims Are Properly Pled.**

20 **A. Plaintiff's claim for unlawful destruction of computer data is**
 21 **adequately pled.**

22 California Penal Code Section 502 requires allegations that a
 23 defendant "[k]nowingly accesses and without permission adds, alters,
 24 damages, deletes, or destroys any data . . . which reside or exist internal or
 25 external to a computer, computer system or computer network." Cal. Penal
 26 Code § 502(c)(4). Biosuccess's Complaint explains that Ben Chang
 27 destroyed and erased all of the computer files in the Biosuccess system
 28 related to its U.S. operations. Complaint, ¶ 96. Although Defendants claim

1 that no further allegations were made (Mtn. at 9:21-24), this is not true. The
 2 Complaint also alleges Ben Chang refused to preserve documents and emails
 3 on his computer as requested by Biosuccess, and that he instead “erased the
 4 entire contents of his work related computer, including deleting all emails.”
 5 Complaint, ¶ 22.

6 Biosuccess properly pleads a claim for violation of § 502. Biosuccess
 7 has alleged that Ben Chang’s deletion of files was against Biosuccess’s
 8 instructions, and therefore, without permission. *See Weingand v. Harland*
 9 *Financial Solutions, Inc.*, 2012 WL 2327660, *4 (N.D. Cal. June 19, 2012)
 10 (declining “at this early stage of the proceedings” to conclude that party’s
 11 “alleged conduct beyond his conditional access to [the] computer for the
 12 purpose of obtaining files he did not have authority to access[,] is outside the
 13 scope of § 502.”).

14 **B. Plaintiff’s claim for trespass to chattels is adequately pled.**

15 Defendants contend that Biosuccess’s claim for trespass to chattels
 16 fails because the Complaint fails to put Ben Chang “on notice on what he is
 17 being accused of.” Mtn. at 10:1-8. Again, Defendants are wrong. To state a
 18 claim for trespass to chattels, a plaintiff need only allege: (1) defendant
 19 intentionally and without authorization interfered with plaintiff’s possessory
 20 interest in the computer system; and (2) defendant’s unauthorized use
 21 proximately resulted in damage to plaintiff.” *eBay, Inc. v. Bidder’s Edge, Inc.*,
 22 100 F. Supp. 2d 1058, 1069-70 (N.D. Cal. 2000) (citing *Thrifty-Tel, Inc. v.*
 23 *Bezenek*, 46 Cal. App. 4th 1559, 1566 (1996)).

24 Biosuccess has pled that Ben Chang “intentionally and without
 25 authorization interfered with Biosuccess’s possessory interest” in its
 26 computers and files by deleting files from his laptop. Complaint, ¶ 102. *See*
 27 *also* Complaint, ¶¶ 22, 96. Moreover, Biosuccess has pled damages of a
 28

1 result of Ben Chang's conduct. Complaint, ¶ 103. Therefore, Defendants'
2 motion to dismiss the trespass to chattels claim should be denied.

3 **LEAVE TO AMEND SHOULD BE GRANTED IF NECESSARY**

4 As explained above, Biosuccess believes its allegations are sufficient
5 on all claims. Nevertheless, Biosuccess requests leave to amend its
6 Complaint to the extent necessary to address any deficiencies identified by
7 the Court. The Ninth Circuit has "repeatedly held that a district court should
8 grant leave to amend even if no request to amend the pleadings is made,
9 unless it determines that the pleading could not possibly be cured by the
10 allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000)
11 (citations and internal quotation marks omitted).

12 **CONCLUSION**

13 For the foregoing reasons, the Court should deny Defendants' Motion
14 to Dismiss the Complaint in its entirety.

15
16 Dated: April 14, 2014

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